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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA
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13 The Church of the Eagle and the Condor, *et*
14 *al.*,

15 Plaintiffs,

16 vs.

17 Merrick Garland, *et al.*,

18 Defendants.
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22-cv-01004

**[PROPOSED] STIPULATED
CLAWBACK AGREEMENT AND
FEDERAL RULE OF EVIDENCE 502(d)
ORDER**

1 The Court hereby orders pursuant to Rule 502(d) of the Federal Rules of Evidence,
2 Rule 26(b) of the Federal Rules of Civil Procedure, and the Court's inherent authority, that
3 the inadvertent production of information or documents (or part of a document), shall not
4 constitute a waiver of any privilege or protection as to that information or any portion of that
5 document, or as to any undisclosed privileged or protected communications or information
6 concerning the same subject matter, in this action or in any other proceeding. This Order
7 applies to attorney-client privilege, work-product protection as defined by Federal Rule of
8 Civil Procedure 26(b), law enforcement privilege, any other governmental privileges, and any
9 other applicable privilege. Nothing in this Order shall constitute an admission that any
10 information or document disclosed in this litigation is subject to any of the foregoing privileges
11 or protections, or that any party is entitled to raise or assert such privileges. The Party asserting
12 any such privilege or protection bears the burden of establishing that it applies. Additionally,
13 nothing in this Order shall prohibit parties from withholding from production any document
14 covered by any applicable privilege or other protection.
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16 The Parties intend that this stipulated order shall provide additional protections beyond
17 the provisions of Fed. R. Evid. 502(b)(1) and (2). That is, the disclosure of privileged or
18 protected information, as described above, in this action shall not constitute a subject matter
19 waiver of the privilege or protection in this or any other federal or state proceeding, regardless
20 of the standard of care or specific steps taken to prevent disclosure. However, nothing in this
21 Order shall limit a party's right to conduct a pre-production review of documents as it deems
22 appropriate.
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24 I. DEFINITIONS

25 1. "Party" shall mean any party to this action, including all of its officers, directors,
26 employees, consultants, retained experts, and outside counsel of record (and their support
27 staffs).
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2. “Non-Party” shall mean any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

3. “Designating Party” shall mean the person, Party, or Non-Party who designates information or documents as “Protected Information.”

4. “Producing Party” shall mean the person, Party, or Non-Party producing discovery in this action.

5. “Receiving Party” shall mean any party who receives or is shown discovery in this action.

6. “Document” shall mean all items listed in Fed. R. Civ. P. 34(a)(1)(A) and (B).

II. PROCEDURES

The procedures applicable to a claim of privilege on a produced document and the resolution thereof shall be as follows:

1. The Producing Party retains the burden of establishing the privileged or protected nature of any produced information or document for which a privilege or protection is asserted. Nothing in this Order is intended to shift the burden to identify privileged and protected documents from the Producing Party to the Receiving Party.

2. If a Party or Non-Party discovers that it has received a document, or part thereof, produced by another party that is privileged or otherwise protected, the Receiving Party shall promptly notify the Producing Party and must then promptly return the document or destroy it (to the extent reasonably technically feasible, if the document is stored on a computerized system or is incorporated into another document) and certify that it has been destroyed to the Producing Party. The Receiving Party must also promptly identify, sequester, and destroy any notes, summaries, or other written materials about the document (to the extent reasonably technically feasible, if the document is stored on a computerized system or is incorporated into another document).

1 3. If the Producing Party determines that a document produced, or part thereof,
2 is subject to privilege(s) or other protections, the Producing Party shall give the Receiving
3 Party notice of the claim of privilege or protection (“Privilege Notice”).

4 4. The Privilege Notice must contain information sufficient to identify the
5 document, including, if applicable, a Bates number, as well as identification of the privilege
6 asserted and its basis.

7 5. Upon receiving the Privilege Notice, if the Receiving Party accepts the privilege
8 assertion made, the Receiving Party must promptly follow the procedures set forth in
9 Paragraph II.2 above applicable to a Receiving Party’s own discovery of a document’s
10 privileged or otherwise protected nature. Such acceptance shall not operate as an admission
11 that the claimed privilege or protection applies, nor shall it prejudice in any way a Party’s ability
12 to challenge a claim of privilege or protection in the future. If a Receiving Party disclosed the
13 document or information specified in the Privilege Notice before receiving the notice, it must
14 take reasonable steps to retrieve it, and so notify the Producing Party of the disclosure and its
15 efforts to retrieve the document or information.

16 6. Within fourteen (14) calendar days of notification that the Receiving Party
17 returned, destroyed, sequestered, or deleted the specified document(s), copies, and notes, the
18 Producing Party shall produce a privilege log with respect to the specified documents.

19 7. Upon receiving the Privilege Notice, if the Receiving Party wishes to dispute a
20 Producing Party’s Privilege Notice, the Receiving Party shall promptly meet and confer with
21 the Producing Party. The document(s) shall be sequestered immediately upon receiving the
22 Privilege Notice and not be used by the Receiving Party in the litigation while the dispute is
23 pending. If the Privilege Notice concerns a document that a Receiving Party intends to use in
24 a filing, and the Notice is received within five business days of the filing’s deadline, the Parties
25 agree that (a) the Party adverse in this action to the Receiving Party will consent to a motion
26 to extend the filing’s deadline by up to seven business days, so that the Receiving Party can
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1 revise the filing to remain in compliance with this Agreement and Order, and (b) good cause
2 will exist to support granting a such motion by the Receiving Party. Nothing in this Order
3 shall limit a Receiving Party's right to move to extend a filing deadline if a Privilege Notice is
4 received more than five business days before the deadline.

5 8. If the Parties are unable to come to an agreement about the privilege assertions
6 made in the Privilege Notice, the Receiving Party may make a sealed motion for a judicial
7 determination of the privilege claim. However, no written discovery motion may be filed
8 without a prior conference with the Court and leave of the Court, pursuant to the Court's
9 Case Management Order, ECF No. 34, at 3. Nothing in this Order shall limit the right of any
10 Party to request an *in camera* review of inadvertently disclosed information.

11 9. Pending resolution of the judicial determination, each Party shall preserve and
12 refrain from using the challenged information for any purpose and shall not disclose it to any
13 person other than those required by law to be served with a copy of the sealed motion. The
14 Receiving Party's motion challenging the assertion must not publicly disclose the information
15 claimed to be privileged. Any further briefing by any Party shall also not publicly disclose the
16 information claimed to be privileged if the privilege claim remains unresolved or is resolved
17 in the Producing Party's favor.

18 10. If a document must be returned or destroyed as determined by the process
19 above, that document, along with copies and notes about the document, that exist on back-
20 up tapes, information technology ("IT") systems, or similar storage need not be immediately
21 deleted or destroyed, if such materials will be overwritten and destroyed in the normal course
22 of business. Until they are overwritten in the normal course of business, the Receiving Party
23 will take reasonable steps to limit access, if any, to the persons necessary to conduct routine
24 IT and cybersecurity functions.

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2 Agreed to by:

3 BRIAN M. BOYNTON
4 Principal Deputy Assistant Attorney General

5 BRIGHAM J. BOWEN
6 Assistant Branch Director

7 /s/ Giselle Barcia
8 GISELLE BARCIA
9 Trial Attorney
10 Civil Division, Federal Programs Branch
11 U.S. Department of Justice
12 1100 L Street NW
13 Washington, D.C. 20005
14 Telephone: (202) 305-1865
15 Fax: (202) 514-8640
16 E-mail: giselle.barcia@usdoj.gov

17 *Counsel for Defendants*

18 By: s/ Jack Silver
19 Jack Silver, *pro hac vice*
20 Cal. Bar No. 160575
21 Law Office of Jack Silver
22 708 Gravenstein Hwy No. # 407
23 Sebastopol, CA 95472-2808
24 JsilverEnvironmental@gmail.com
25 Tel: (707) 528-8175
26 Fax: (707) 829-0934

27 By: s/ Gilbert Paul Carrasco with permission
28 Gilbert Paul Carrasco, *pro hac vice*
Cal. Bar No. 90838
D.C. Bar No. 334722
Professor of Law
Willamette University College of Law
c/o 19431 Sunray Lane, Suite # 102
Huntington Beach, California 92648-6401
carrasco@willamette.edu

Tel: (714) 698-8142
Mobile: (503) 990-4879

By: s/ Sean T. McAllister with permission
Sean T. McAllister, Esq., *pro hac vice*
Colo. Bar No. 31350
Cal. Bar No. 310962
McAllister Law Office, P.C.
4035 E. 3rd Avenue
Denver, CO 80220
sean@mcallisterlawoffice.com
Tel: 720-448-6235

By: s/ Martha J. Hartney with permission
Martha J. Hartney, Esq., *pro hac vice*
Colo. Bar No. 42017
Hartney Law, LLC
4450 Arapahoe Avenue, Suite 100
Boulder, CO 80303
martha@hartneylaw.com
Tel: (303) 747-3909
Fax: (303) 835-7199

By: s/ Ismail Lourido Ali with permission
Ismail Lourido Ali, Esq., *pro hac vice*
Cal. Bar No. 312660
1530 Campus Drive
Berkeley, CA 94708
lourido.ali@gmail.com
Tel: (559) 801-7317

Attorneys for Plaintiffs